REGD. GOA - 5

Panaji, 30th March, 1999 (Chaitra 9, 1921)

SERIES II No. 52

OFFICIAL GAZETTE

GOVERNMENT OF GOA

SUPPLEMENT

GOVERNMENT OF GOA

Department of Labour

—

Order

No. 28/10/89-ILD

The following Award given by the Industrial Tribunal, Goa, Daman and Diu is hereby published as required under the provisions of Section 17 of the Industrial Disputes Act, 1947 (Central Act XIV of 1947).

By order and in the name of the Government of Goa.

V. G. Manerkar, Under Secretary (Labour).

Panaji, 12th January, 1993.

IN THE INDUSTRIAL TRIBUNAL
GOVERNMENT OF GOA
AT PANAJI.

(Before Shri M. A. Dhavale, Hon'ble Presiding Officer)

Ref. No. IT/32/89

Workmen. — Party I/Workmen
v/s
1. M/s Goa Bottling Co. Pvt. Ltd.
2. Shri Prakash Naik. — PartyII/Employer

Workmen represented by Shri R. Mangueshkar.
Employer represented by Adv. B. G. Kamat.

Panaji, Dated : 15-12-92.

AWARD

In exercise of the powers conferred by clause (d) of sub-clause (1) of S. 10 of the Industrial Disputes Act, 1947, the Government of Goa, by its order No. 28/10/89-ILD dated 21st April, 1989 has referred the following issue for adjudication by this Tribunal :

"Whether the action of the management of M/s Goa Bottling Company Private Limited, Arlem, and Shri Prakash Naik, contractor, in refusing the employment of the following 33 workpersons employed as loaders and unloaders inside the factory premises with effect from 23-10-1987 is legal and justified ?

1. Ms. Martin Baretto.
2. Ms. Silvia Baretto.
3. Ms. Anna Maria D'Sa.
4. Ms. Nikel Cardozo.
5. Ms. Esperanca Fernandes.
6. Ms. Joaquina Fernandes.
7. Shri Vasant Borkar.
8. Shri Mahesh Borkar.
9. Shri Krishna Borkar.
10. Shri Milagres Barretto.
11. Shri Justiano Fernandes.
12. Shri Caitano Colaco.
13. Shri Gregory Rodrigues.
14. Shri Anthony Fernandes.
15. Shri Andrew Fernandes.
16. Shri Ramdas Naik.
17. Shri Sudhakar Maina.
18. Shri Diago Fernandes.
19. Shri Joao D'Souza.
20. Shri Rosario Barretto
21. Shri Alberto Pinto.
22. Shri Caitano Fernandes.
23. Shri Agnello Fernandes.
24. Shri Constance Fernandes.
25. Shri Rosario Noronha.
26. Shri Manuel Fernandes.
27. Shri Salvador Fernandes.
28. Shri Ramesh Kotarkar.
29. Shri Lawrenco Fernandes.
30. Shri Bostiano D'Silva.
31. Shri Raju Palikar.
32. Shri Prakash Devidas.
33. Shri Surendra Naik, and

2. Whether the demand of the Union for weekly offs and a daily wage of Rs. 35/- per day per person to the 33 workmen is legal and justified?

If not, to what relief the workmen are entitled?"

2. On receipt of this reference, a case at No. IT/32/89 was registered and notices were served upon both the parties in response to which they appeared and submitted their pleadings.

3. Party I-Workmen (hereinafter called as the 'workmen') have filed a statement of claim Exb. 2 wherein they have averred as folllows:

Party II-M/s Goa Bottling Company & Pvt. Ltd. (hereinafter called as the "Employer-Company") is a manufacturer of leading brands of soft drinks like Limca, Thums Up, Rim-Zim, Gold Spot, Mazza, Biselery Soda etc., which has a vide demand in Goa and outside. The Company has many depots in and outside Goa and the company has many depots in and outside Goa and the Company makes huge sales and earns very good profit. Generally, the factory works in one shift but during heavy demands or in season works in two shhifts. About 30/40 trucks are loaded and unloaded daily and each truck carries about 500 to 600 boxes. It is the case of 33 workmen named above, that they were employed by Party II at Arlem through a Contractor by name Shri Prakash Naik. The above workmen put in several years of service ranging from 1 to 10 years. They worked as loaders and unloaders for the Company. 43 loaders joined the Union of Party I. 10 workers from the said 43 workers are directly employed by the Employer - Company. 33 of the workers were employed through the said Contractor and this reference pertains to the said 33 workmen. In another reference bearing No. IT/6/89 the Government of Goa has referred the dispute in respect of the remaining 10 workmen. Besides loading and unloading work, the workmen also filled the bottles and arranged them in the respective boxes or racks. They also did the work of cleaning and sorting out damaged boxes. However, the workers are paid a pathetic wage of Rs. 15/- per day. They are also not given any other benefits. They are also required to do overtime work till 10.00 p. m. Ladies to are kept on overtime basis and no compensatory offs are given for the work done on Sunday and Holidays. Some of the loaders and unloaders are regular employees of Company drawing salary of Rs. 1200/- per month besides other facilities and benefits. However, these 33 loaders employed by the Company through the said Contractor are paid a meagre salary of Rs. 15/- per day. Thereafter, the workers joined the Union and that circumstance angered the management of Party II, which refused employment to the above named 33 workmen on 23-10-87. Thereafter, by a letter dated 25-10-87 the Union raised an industrial dispute before the Asst. Labour Commissioner, Margao, alleging that the Company declared an illegal lock-out refused to employ the above named 33 persons. They also made a demand for a higher wage at Rs. 35/- per day and other statutory benefits. The Company thereafter engaged new workers. The workmen protested against this act of the company to the Dy. Labour Commissioner and requested him to intervene for reinstatement of the above named 33 workers. Now, although several intimations were sent to the Employer-Company as also to its Contractor still they did not attend the conciliation proceedings, with the result that the Dy. Labour Commissioner made a failure report to the Government, in response to which, the Govt. was pleased to make this reference for adjudication. The workmen therefore prays that the action of the management of Party II- Employer in refusing employment to 33 workers be declared as unjustified and illegal and they should be reinstated with full back wages and other benefits.

4. Party II- M/s Goa Bottling Company & Pvt. Ltd., by its written statement at Exb. 3 resisted the workmen's claim contending interalia as follows:

At the outset, it has been submitted that the schedule to the order of reference dated 21st April, 1987 proceeds on the assumption that Shri Praksah Naik was the Contractor of the Company and that the 33 persons mentioned in the said schedule were employed by the Company through Shri Prakash Naik for loading and unloading work of the Company. However, it is denied that Prakash Naik was the Company's contractor at any time and instead he was an independent employer and had no connection whatsoever with the Company's affairs.Thus, there never existed a relationship of employer and employee between Party I and Party II directly or indirectly, and hence the reference is not maintainable. It is true that Party II is a Company registered under the Company's Act 1956 and it manufactures soft drinks at its factory at Arlem, Raia, Goa. Having regard to the requirments, the Company employed about 85 employees in 1987 in different categories for carrying out various works in the factory. All the employees of the Company are the members of a Trade Union known as the Goa Shops & Industrial Worker's Union, Margao, Goa. The Company had entered in various settlements with the said Union in the past. The Company is a whole sale dealer in soft drinks and there are about 19 stockists in different parts in Goa. Each one of them is an individual stockist having its own registration under the Shops Act. Till June, 1980 these stockists used to bring their own vehicle along with labourers for loading and unloading of the bottles at the Company's factory. However, since July, 1980 all its stockists after deliberations among themselves arranged to engage a common independent person with sufficient work force for loading/unloading operations at the company's factory premises. Accordingly, all these stockists appointed Shri P. Naik as their Contractor for performing the various works on behalf of stockists. However, the Company was not a party to this arrangement and the said arrangement of the stockists was without creating any joint venture between the company, the said stockists and Prakash Naik. Out of 33 workmen named above Prakash Naik had employed only 13/15 employees and they were sufficient to carry out the work on behalf of stockists. The company further states that the entry of the persons employed by Prakash Naik in the Company's factory premises was purely permissive in nature, subject to engagement of said Prakash by the stockists and was not dependent on any contract of employment directly or indirectly with any of the said persons. It appears that a dispute arose between Contractor P. Naik and the workmen in respect of rates of wages etc. Hence Prakash Naik stopped attending the work of stockists from 23rd October, 1987 and finally by the letter dated 31st Oct., 1987 he communicated to the Co., about his inability to settle the dispute with the workmen about termination of engagement and about his not attending the Company's factory with his workers from 31st Oct., 1987. It is the say of the Company that in as much as Contractor Prakash Naik terminated his contract with the stockists, the Company did not permit any of his workmen to enter the factory permises from 2nd Nov., 1987. During the conciliation proceedings all the above facts were brought to the notice of the Conciliation Officer and also to the Secretary of the Government of Goa. Hence, it has been contended that in fact there was no sufficient material with the Government to come to a conclusion that there existed any relationship of employee and employer between the parties and hence the present reference is void abanitio. The Company has also controverted the workmen's allegation in para. 2 to 10 and have ultimately prayed that the present reference be dismissed.

5. Shri Prakash Naik, Contractor by his written statement at Exb. 4 resisted the workmen's claim contending inter alia as follows:

It is denied that 33 persons named in the Schedule to the reference were employed by him as a contractor of Goa Bottling Co. Pvt. Ltd., or that any of the said workers served as loaders or unloaders in the said Co., as alleged in the statement of claim. Instead it has been contended by Shri P. Naik that he used to employ about 13/15 persons in his capacity as an independant employer for attending the work of loading and unloading for the stockists of soft drinks manufactured by Goa Bottling Co. Pvt., Ltd. It is denied that any of the worker was asked to do overtime and that their wages were poor. It is denied that Goa Bottling Co, refused employment to any of the persons named above. Instead the Union, purporting to act on behalf

of the employees instigated them to refuse to work for the employer from 23rd Oct., 1987 and further made a demand for higher wages. Thereafter, the said refusal took a violent turn at the instigation of the Union and the Co., was required to close its business activities from 31st Oct., 1987. It has been contended by Shri P. Naik that he had duly informed the Company about his inability to continue with the work of loading and unloading the Company's product. It has been further contended that in view of the closure of business activities, there never existed any scope for holding conciliation proceedings under the I. D. Act. Hence it has been prayed that the reference be rejected, since the workmen are not entitled to any relief whatsoever.

Thereafter, Party I-Workmen filed a rejoinder (Exb. 5) wherein the contentions taken by the Company and the Contractor have been controverted and the workmen further reiterated their claim made in the statement of claims.

7. On these pleadings, my learned Predecessor framed the following issues at Exb. 6:

1. Whether the 33 workmen under the Government reference were some of the workmen engaged by the contractor Shri Prakash Naik for doing the work of loading and unloading as contended in Para. 2 and 5 of the written statement ?

2. Whether all the loading and un-loading work of the crates of the products of the company was being done by the stockists through the contractor Prakash Naik as claimed by Party II/Company?

3. Whether the 33 persons mentioned in the Govt. reference are the employees of the Contractor or the employees of the Company?

4. Whether the management of M/s Goa Bottling Company Pvt. Ltd., Arlem, or whether Prakash Naik, Contractor, refused employment to the 33 workmen as loaders and unloaders inside the factory premises without just and legal grounds as alleged?

5. If so, what reliefs if any are the workmen entitled to in this Government reference?

8. My findings on the above issues are as follows for the reasons stated below:

1. In the affirmative.

2. In the affirmative.

3. 33 workmen mentioned in the reference are the employees of the contractor.

4. Party II-Goa Bottling company did not refuse employment to Party I-Workmen.

5. The Workmen are not entitled to any relief.

REASONS

9. The rival contentions of the parties to this dispute have been stated in the opening paragraphs of this judgement which need no further repetition. The evidence in this case consists of the statements of two witnesses on behalf of each party and the relevant documents. Now, some of the facts which are either admitted or which can otherwise be taken as duly proved from the evidence on record, need be stated in the beginning.

10. It is a common ground that Party II-M/s Goa Bottling Co., Pvt. Ltd., is a company registered under Companies Act having its factory at Arlem, where soft drinks like Limca Thumps Up, Rim Zim, Gold Spot etc., are manufactured. The Company is a manufacturer and a wholesaler in soft drinks which are distributed to several stockists in Goa and outside. For loading and unloading the bottles and boxes of soft drinks, some loaders and unloaders used to be engaged and it is the contention of Party II-Co., that the said work was done by a contractor by name Shri Prakash Naik. However, after the workers formed an union, they started demanding higher wages, which contractor P. Naik was unable to pay and hence there was a refusal on the part of the workers to work under Shri P. Naik. Hence Prakash Naik was forced to inform the Company about his inability to supply workers for the stockists for delivering goods from the factory's premises. Now, the main contention of the Company is in substance to the effect that 33 workers named in the schedule were not direct employees of M/s Goa Bottling Co., and instead they were the employees of Contractor Prakash Naik, who had engaged them for loading and unloading soft drinks for delivering them to the stockists in Goa. Shri Prakash Naik alleges that there were contracts between him and the stockists to whom the goods were to be delivered from the factory's premises and that he was not the Company's contractor. On the other hand, Party I- Workmen allege that they were the direct employees of M/s Goa Bottling Co., and since they were illegaly terminated without following the proccedure laid down in the I. D. Act, they should be given the relief of reinstatement etc. This being the crux of the whole dispute, I now proceed to consider the evidence led before me. Now, it has been rightly pointed out by Shri B. G. Kamat for Party II that since the workmen were not the direct employees of Party II, they did not raise any dispute in regard to their illegal termination before the principal employer. Instead, they directly approached the Labour Commissioner before whom the conciliation proceedings started. Now, there is absolutely nothing in the oral assertions of two witnesses examined on behalf of Party I to show that they or their Union had first approached the employer i. e. Goa Bottling Co., for making a grievance in regard to their termination of service. This fact is also evident from the recitals in the statement of claim filed on behalf of the workmen. In para. 8 of Exb. 2, it has been stated that when the employment was denied to 33 workmen, they protested to the Dy. Labour Commissioner over this un-justified and illegal action of Party II and demanded that they may be permitted to join with full back wages and continuity of service. In para. 9, it has been further submitted that pursuant to the said dispute raised before the Dy. Labour Commissioner, several intimations and requests were made to all the three parties to appear. Thus, from the aforesaid clear and unambiguous recitals in the statement of claim, itself, it is evidence that no dispute was raised firstly before the employer i. e. either before Goa Bottling Company or even before Contractor Prakash Naik and instead the Union directly approached the Dy. Labour Commissioner for conciliation as can be seen from Exb. 8 and Exb. 9 produced by Party I. In view of the matter, the main question that arises for determination is whether an industrial dispute existed between the parties before invoking the jurisdiction of the Labour Commissioner for intervention or conciliation. Now, the position of law on this point is well settled and a reference can usefully be made to some of the rulings on this point. In the case of Fedders Lloyd Corporation (Pvt.) Ltd. v/s Lt. Governor, Delhi and others reported in AIR 1970 Delhi, 60. It has been observed thus:

"Demand by workmen must be raised first on Management and rejected by them before industrial dispute can be said to arise and exist - Making of such demand to Conciliation Officer and its communication by him to Management who rejects the same is not sufficient to constitute industrial dispute (AIR 1968 SC 529, Foll.)

11. A similar view has also been taken by Orissa High Court in the case of Orissa Industries (P) Ltd., and Presiding Officer, Industrial Tribunal reported in 1976 LAB I. C. 285, wherein the head note runs thus :

"Before an 'industrial dispute' can be said to exist between a workman and the Employer-management, there must be a demand by the workman before the management as required by Rule 3. Only if a dispute exists between employer and workman, a reference can be made by the State Government under Section 10(1) for adjudication of the dispute by the Tribunal. In the absence of such a dispute, if the Government is still of opinion that a dispute exists, the opinion so formed is without materials and the exercise of power by way of reference is without jurisdiction.

A reference under Section 10(5) or under S. 12 (4) and (5) would be without jurisdiction unless an industrial dispute exists between the employer and the workmen after the workmen make a demand before the management. 1968 Lab. I. C. 526 (SC). 1970 Lab I. C. 421 (Delhi) 1972 Lab. I. C. 676 (SC). Rel. on: (1974) 2 Lab LJ 6 (Ori.) 1970 Lab. I. C. 1119 (Pat) Dist."

12. A reference can also be made to a ruling of our High Court in the case of Iqbal Ahmad Kamaruddin and P. L. Majumdar reported in 1992 FLR (64) wherein the head note lays thus:

"If what is referred to a Tribunal/Labour Court is not an Industrial Dispute, it is always open to a party to show to the forum that the dispute referred for adjudication, though purported to be an Industrial Dispute, is in reality not an Industrial Dispute at all. This has always been recognised as an exception to the general rule postulated in Section 10 (4). It is, therefore, always permissible for an employer to raise an issue as to whether what has been referred to is an Industrial Dispute at all and there can be no question of the Tribunal being bound by the order of reference upon a prima facie view of the matter as to the existence or apprehension of an Industrial Dispute; it is open to the parties to show that what is referred is not in reality an industrial dispute at all".

13. A similar view has also been taken by Their Lordships of Panaji Bench of Bombay High Court, in the case of Sitaram Vishnu Shirodkar and the Administartor, Government of Goa and others reported in 1985 I LLJ 480.

14. Thus, relying on the aforesaid rulings, it will have to be concluded that since no dispute was raised before the Employer-Goa Bottling Co., or even before the Contractor, it cannot be said that there existed any industrial dispute and on this count alone it will have to be observed that the present reference is not tenable.

15. Even assuming for the sake of argument that the reference is tenable and survives for consideration, still on merits I think Party I has a very little case. The evidence led on behalf of Party I-consists of the statements of two workmen namely Nikel Cardezo and Ana Maria D'Sa. Besides, this oral evidence Party I has produced only 2 documents at Exb. 8 and Exb. 9. Exb. 8 is a letter written by the President of Goa Trade & Commercial Workers' Union, to the Astt. Labour Commissioner, to the Manager and also to Prakash Naik informing that the workers have formed an Union. Exb. 9 is a letter sent by the Union to the aforesaid three persons in which an industrial dispute was raised that there was illegal lockout of 33 workers. Besides these 2 documents there is no other documentary evidence in proof of the workmen's claim. Now, the first workman examined on behalf of Party I is Nikel Cardozo, who in her evidence has attempted to state that she was taken to the factory by Prakash Naik and was interviewed by Shri Kamat who is the Director of Goa Bottling Company. The other workmen, she states, were also brought by Prakash Naik to the factory and interviewed by Shri Kamat. Then, she has stated that she and others used to load the crates containing bottles from the factory premises and used to un-load them at the shops of stockists. She has further made a statement that the work of loaders was supervised by the officers of the Company. Finally, she has also stated that an industrial dispute was raised before the Labour Commissioner for conciliation in respect of which she has relied upon Exb. 9. However, even in her examination in chief, she has had to admit that she has no knowledge about the relationship between Prakash Naik and the Company. In her cross examination she has attempted to deny the suggestions indicating that she was not employed by the Company but by the Contractory. To the same effect there is the evidence of another workman by name Ana Maria D'Sa (Exb. 10). In her examination in chief she has stated that Prakash Naik was not the Contractor as claimed by the Company, but he was also an employee of the Company. Now, these assertions are patently false as can be seen from the oral and documentary evidence produced by Party II, which I will consider hereinafter. She has also stated that after they were refused employment, they approached the Union, which took the matter before the Labour Commissioner. In her cross examination, she has denied the suggestion that she was not the worker of the Company but of the Contractor. Thus, this is the only evidence led on behalf on Party I, to prove its claim.

16. As against this evidence, Party II has examined Shri D. R. Borker, who is the General Manager of Goa Bottling Company. In his evidence, he has stated that there are in all 65 workers serving in the factory as well as in the office. All of them were the members of Goa Shops & Establishment Workers Union. There was one settlement with this Union which can be found at Exb. 12. The perusal of Exb. 12 discloses that the names of Party I-Workmen do not appear in the Annexure appended to this settlement at Exb. 12. This is one circumstance to show that Party I workmen were not the employees of Goa Bottling Co. Shri Borker has stated that the Company had appointed stockists in Goa and they used to take delivery of goods from the factory premises. There were as many as 16 stockists in the year 1987 and all of them had engaged a Contractor by name Prakash Naik who used to engage workers for loading and unloading. However, he has categorically stated that the Company had no relationship with Prakash Naik as a Contractor and as such Party I-Workmen were not the workers of the company. Instead, they were the workers employed by Contractor who used to pay them. Finally, he has stated that in October, 1987, Prakash Naik informed the Company by a letter that he had discontinued the contract and hence the company sent a letter. These two documents are at Exb. 14 and Exb. 15. Exb. 14 is a letter written by Prakash Naik to the General Manager of Goa Bottling Co., informing him that there was no possibility of settlement between him and his labourers atleast in the near future. Accordingly, he had intimated all the company's stockists that *his contract with them shall be treated as terminated and cancelled.* Hence, he has further written that he and his labourers will not be attending factory premises for loading and unloading operations henceforth. This letter is dated 31st Oct., 1987 and there is absolutely nothing to challenge its authenticity. To this letter, the General Manager sent a reply at Exb. 15 which is dated 2nd Nov., 87. The General Manager has given the acknowledgement, of the contractor's letter at Exb. 14 and has further informed Prakash Naik thus:

"In view of the contents thereof, kindly note that you or your personnels shall not be permitted to enter our factory premises hereinafter."

17. These two documents of 1987 leave absolutely no doubt to conclude that whatever has been stated by Party II-Goa Bottling Company is substantially true.

18. In his cross examination, it has been brought on record that he does not know whether Prakash Naik is a registered contractor. He has denied the suggestion that the workers of Party I were on the roll of attendance of Goa Bottling Company. He has further stated that there was no agreement between the stockist and the Company regarding the appointment of Contractor. He has further denied the sugges-

tion that Prakash Naik was the Contractor of Goa Bottling Company. He has also denied the suggestion that these 33 workman were paid by the Co. Instead, he has categorically stated in his cross examination that Prakash Naik used to pay these workman. He has also stated that after Prakash Naik discontinued his contract, the Compay engaged 15 workmen for loading and unloading its goods, and they are directly working under the Company. As such, they are the Company's employees and they are getting all the benefits available to the Company' staff. Then a suggestion was put to him as to whether he has discharged Prakash Naik and 33 others, to which he has answered in the negative.Thus, Shri Borker has categorically adhered to his say that Shri Prakash Naik was not the Company's employee and as such the 33 workers engaged by Contractor were also not the Company's employees. Thus, the evidence given by Shri Borker substantially supports all the material contention taken by Pary II in its written statement.

19. Shri Prakash Naik has also examined himself at Exb.16 wherein he has fully coroborated all the material statements made by Shri Borker. He has clearly stated that he was the Contractor of 10 stockists since 1979. The cold drinks used to belong to the Company , which were loaded by the workman engaged by him. He has stated that on the behalf of the stockists, the Company used to make payments and he used to charge 20 paise for every crate of bottles. These charged were made by the Stockists. He has also stated that he used to make daily payments to the workers. His contention is that all the 33 workers were not employed simultaneously or on every day. Instead, he used to enagage 10 to 12 workers according to the need. Finally, he has stated that his business activities continued till 23rd October, 1987. Thereafter, since the workers started demanding Rs. 35/- per day, he discontinued his contract because he was unable to acceded to the demands of the workmen.Accordingly, he sent a letter which is at Exb.14, which has already been referred to.

20. He has been very searchingly cross examined by Shri R. Mangueshkar for Party I. However, at the outset, it will have to be stated that the material assertions made by him have remained unshuttered. Instead, in his cross examination, some suggestions were put to him in pursuance of which he produced some documentary evidence which substantially support his oral assertions. In his cross examination, he admitted to produce the written agreements with the stockists and eventually he did produce the same which can be found at Exb. 17. Exb. 17 is a file containing as many as 14 agreements between the stockists and Prakash Naik, under which he obtained a contract of loading and unloading bottles of soft drinks from the factory of Goa Bottling Company to the shops of the stockists in Goa. Now, it has been urged that these agreements are not registered and as such they are false and fabricated. It is no doubt true that the agreements are not registered. However, that is not a circumstance to support the argument of Shri Mangueshkar that they are false documents which were subsequently prepared to suit the contractor's contention. All of them have been signed by various stockists and that too in the year 1985 and 1986. It is too much to think that, in order to support the contention of Party II-Prakash Naik endeavoured to produce or bring into existence these false agreements by obtaining the signatures of several stockists in Goa. I, therefore, reject all submissions made by Shri Mangueshkar in this behalf and hold that although these agreements are not registered documents, still they they can be considered for colateral purposes. Besides, it will have to be borne in mind that these documents were produced not in the examination in chief of Prakash Naik, but they were obtained and got produced in the cross examination of Prakash Naik. Hence, once they are produced, they totally dislodge the suggestions made in the cross examination of Prakash Naik that there was no contract between him and the stockists, now it was one of the contentions of the two workmen examined, on behalf of Party I, that they were interviewed by the company's officers. However, Prakash Naik has categorically denied this suggestion. His denial must be accepted in view of the fact that the company had no concern either with Prakash Naik or with his employees. This admission of Prakash Naik has also been brought on record in his cross examination and as such it has greater evidentiary value. He has further stated that all these workers were working with him since 1985 but he was not working for the Company. He has denied that the Company used to pay these workers every week. Instead, he used to supervise the work done by the workmen. He has stated that he had 10 to 12 stockists in 1987 with whom he had entered into written agreement which can be found at Exb. 17. Finally, he has stated that he had no licence and he was not maintaining the attendance or pay registers. Now, what would be the effect of Prakash Naik's inaction in not obtaining a licence and in not maintaining relevant registers would be considered is the later part of this judgement. However, at this stage, it is enough for me to record a conclusion that the oral and documentary evidence led by Prakash Naik leaves absolutely no doubt to conclude that he was the Contractor engaged by the stockists of Goa Bottling Company to whom the goods used to be transported from the factory premises. Shri Prakash Naik was never an employee of the Company and the Company had also not engaged Party I-workmen. Thus, there was no previty of contract between Goa Bottling Company and Prakash Naik and hence it follows that Party I-workmen were never the employees engaged by Goa Bottling Company.

21. Now, in order to supprt the claim made by Party I-workmen Shri R. Mangueshkar has relied upon the rulings reported in:

1. Workmen of Best & Cromption Industries Ltd.

Best & Cromption Industries Ltd., Madras & Ors., 1985 II LLN 169 Madras HC-DB.

2. Food Corporation of India

V/s

Central Government Industrial Tribunal, Chandigarh & Ors. 1987 LLR 221; 1987 (70) FJR 395.

3. Kanti Weekly

V/s

D. D. Gupta, 1983-1 LLN 772 (Delhi HC); 1983 Rajdhani Law Reporter 237.

However, at the outset, it will have to be stated that the view taken by the High Court of Bombay and Madras in the aforesaid first two rulings has been overruled by the Supreme Court in a latest ruling reported in 1992 LAB IC 75 in the case of Dena Nath and others v/s National Fertilisers Ltd., and others. In the head note, it has been observed that non-compliance with the provisions of registration or license under Contract Labour (Regulation and Abolition) Act, 1970 exposes the contractor to a prosecution but the labour employed by the Contractor does not become direct employees of the principal employer. In the head note, it has been observed thus :

" The Act merely regulates the employment of contract labour in certain establishment and provides for its abolition in certain circumstances. The Act does not provide for total abolition of contract labour but it provides for abolition by the appropriate Government in appropriate cases under S. 10. It is not therefore for the Court to inquire into question and decide whether the employment of contract labour in any process, operation or in any other work in any establishment should be abolished or not. It is a matter for the decision of the Government after considering the matter, as required to be considered under S. 10. The only conse-

quences provided in the Act where either the principal employer or the labour contractor violates the provision of Ss. 9 and 12 respectively is the penal provision, contained in Ss. 23 and 25. Therefore, in proceedings under Art. 226 of the Constitution merely because contractor or the employer had violated any provision of the Act or the rules, the Court could not issue any mandamus for deeming the contract labour as having become the employees of the principal employer. (1990) 60 Fac. LR 686 (Bom) and (1985) I Lab. I. J. 492 (Mad), Overruled."

22. Thus, it is evident that the view previously taken by Our High Court as also by Madras High Court, on which reliance has been placed by Shri Mangueshkar, did not find approval with their Lordships of the Supreme Court in the case of Dena Nath and others (Supra) and hence the law stated by the Apex Court lays down that the labourers or workmen engaged by the Contractor are not deemed to be the employees of the principal employer. Now, in view of this established law on this point, it follows that all submissions made by Shri Mangueskar in this behalf cannot possibly be accepted. I, therefore, hold that Party I-33 Workmen cannot be said to be the employees of Party II-Goa Bottling Company and as such they cannot lay any claim against the said Company.

23. Now, Shri Mangueshkar has also urged that Contractor Prakash Naik has committed several breaches of the provisions contained in the Contract Labour (Regulation & Abolition) Act, 1970. He has supported his argument by saying that Prakash Naik did not obtain any licence nor did he obtain registered agreements from the stockists who had engaged him for the work of loading and unloading bottles from Goa Bottling Company. Even assuming for the sake of argument that the same is true, still this is not the proper forum to consider Shri Mangueshkar's argument in this behalf. I am supported in this conclusion of mine by a ruling reported in (1972) II SCC 724 Vegoils Pvt. Ltd. v/s Workmen wherein it has been observed that after coming into force of the Contract Labour Act, only the appropriate Government and not the Industrial Tribunal has the jurisdiction to give a direction abolishing the contract of labour system. Shri B. G. Kamat for Party II has also relied upon a ruling of Kerala High Court reported in I LLN 247 (Cochin Shipyard Ltd and Industrial Tribunal), wherein it has been observed that the Industrial Tribunal has no jurisdiction u/s 10 of the I. D. Act, to decide matters connecting with Contract Labour (Regulation and Abolition) Act, 1970. Thus, respectfully following the ratio in the above referred cases, the submissions made by Shri Mangueshkar cannot possibly be accepted.

24. In view of my conclusions in the foregoing paragraphs I hold that the 33 workmen or some of them were engaged by the Contractor Shri Prakash Naik for doing the work of loading and unlaoding of bottles from the Company's premises and that the said Contractor was enagaged by the Stockists of Goa Bottling Company and not by Goa Bottling Co., itself. In view of this conclusion it follows that Party I-Workmen cannot lay any claim against Party II-Goa Bottling Company. If Party I-Workmen were refused employment by the Contractor they would have their claim only against the Contractor. However, the evidence on record discloses that the Contractor has now closed down his business and hence there cannot be any relief of reinstatement by the Contractor. The second part of the reference refers to the demand of the Union for weekly offs and daily wages of Rs. 35/- per day. However, this demand does not survive for consideration in view of the closure of business by contractor Prakash Naik. In view of this conclusion, it follows that Party I-Workmen are not entitled to any relief, and hence I answer the issues accordingly and pass the following order :

ORDER

It is hereby declared that Party I-33 workmen named in the schedule of the order of reference were not the employees of Party II-M/s Goa Bottling Company Private Limited, Arlem, and hence Party I-Workmen are not entitled to any relief whatsoever; and their claim stands dismissed.

No order as to costs.

Inform the Government accordingly.

Sd/-
(M. A. DHAVALE)
Presiding Officer
Industrial Tribunal

Order

No. CL/Pub-Awards/97/6996

The following Award dated 8-1-1998 in Reference No. IT/70/92 given by the Industrial Tribunal, Panaji-Goa, is hereby published as required under the provisions of Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

R. S. Mardolker, Ex-Officio Joint Secretary (Labour).

Panaji, 28th January, 1998.

IN THE INDUSTRIAL TRIBUNAL
GOVERNMENT OF GOA
AT PANAJI

(Before Shri Ajit J. Agni, Hon'ble Presiding Officer)

Ref. No. IT/70/92

Shri Cresy Fernandes,
C/o Shri Avertino Fernandes,
Silva Nagar,
Ponda Goa. — Workman/Party I
V/s
M/s Cine Aaisha,
Near Ponda Municipal Council,
Ponda Goa. — Employer/Party II

Workman/Party I - Represented by Shri Vinoo Sawant.

Employer/Party II - Represented by Adv. Shri P. G. Sawardekar.

Dated:- 08-01-1998.

AWARD

In exercise of the powers conferred by clause (d) of sub-section (1) of section 10 of the Industrial Disputes Act, 1947, the Government of Goa by order No. 28/41/92-LAB dated 29-10-1992 referred the following dispute for adjudication by this Tribunal.

"Whether the action of the management of M/s Cine Aaisha, Ponda, in terminating the services of Shri Cresy Fernandes, Rewinder, with effect from 10-6-92 is legal and justified?

If not, to what relief the workman is entitled?"

2. On receipt of the reference, a case was registered ? under No. IT/70/92 and registered A/D notice was issued to the parties. In persuance to the said notice, the parties put in their appearance. The

workman/Party I (For short "workman") filed his statement of claim which is at Exb. 3. The facts of the case in brief as pleaded by the workman are that he was employed with the employer/Party II (For short "Employer") as a Rewinder vide letter of appointment dated Nil. That the workman tried to form an union of the employees of the employer which the employer did not like and therefore, the workman was prevented from entering the place of work and carrying on his duties from 10th June, 1992. That the workman thereafter raised an industrial dispute and the concilliation officer called him and the employer for discussion on 25-6-92. That in the meantime, he received a letter dated 9-6-92 from the employer asking him to explain in writing as to why action should not be taken against him for remaining absent on 7th and 8th June, 1992; and that he replied to the same by letter dated 22-6-92 clarifying that he had not remained absent on 7th and 8th June, 1992 but he was forcibly prevented from resuming duties by the employer. That the employer also wrote a letter dated 9th June, 1992 to the Labour Offficer, Ponda, stating that the workman is constant absentee and remains absent without intimation and prior notice, and that he has been asked not to attend duty without written explanation. That the concilliation proceedings held by the concilliation officer ended in a failure and failure report was submitted to the Government. The workman contended that the employer refused work to him without following the due process of law and therefore, he is entitled to be reinstated in service with full back wages and all other consequential benefits.

3. The Employer filed written statement which is at Exb. 5. The employer stated that a show cause notice was issued to the workman dated 9-6-92 as he remained absent on duty on 7-6-92 and 8-6-92 as a result of which the on going cinema show was stopped by the operator, thereby causing lot of inconveience to the employer. The employer stated that in the reply dated 22-6-92, the workman stated that he never remained absent without any notice and further denied that he remained absent on 7-6-92 and 8-6-92. The employer admitted that it wrote a letter dated 9-6-92 to the Labour Officer, Ponda Goa, stating that the workman remained absent without any prior notice, and that he was asked not to attend to his duties unless he explained in writing about his absence from duty. The employer admitted that the workman replied to the show cause notice and stated that he failed to show cause or give reasons as to why he remained absent on 7th and 8th June, 1992. The employer denied that the workman was forcibly prevented from resuming his duties because of his union activities as alleged by him. The employer contended that since the workman failed to show cause as to why he remained absent on 7th and 8th June, 1992, he is not entitled to be reinstated in service nor he is entitled to any relief. The workman thereafter filed Rejoinder which is at Exb. 6.

4. On the pleadings made by the parties, following issues were framed at Exb. 7.

1. Does party No. I/workman prove that his services were illegally terminated by the Party No. 2 as alleged?

2. Whether the party No.2 employer proves that the workman remained absent on 7th and 8th June, 1992 and he did not reply to the show cause notice issued to him for his unauthorised absence?

3. Whether the workman is entitled to any relief?

4. What Award or Order?

5. My findings on the issues are as follows:

Issue No. 1:- - In the affirmative

Issue No. 2:- - In the affirmative as regards absence on 7th and 8th June, 1992 and in the negative as regards reply to show cause notice.

Issue No. 3:- - As per para 10 below.

Issue No. 4:- - As per order below.

REASONS

6. *Issue Nos. 1 & 2 :-* Both these issues are taken up together as they are inter-related. Both the parties have filed written arguments and they are on record. I have considered the said written arguments. It is not in dispute that the workman was in the employment of the employer as a Rewinder. It is the contention of the workman that he tried to form an union of the employees of the employer and therefore, the employer prevented him from entering the theatre premises and doing his duties from 10th June, 1992. It is also the case of the workman that he did not remain absent on 7th and 8th June 1992 but the Manager of the employer did not allow him to work on the said days. In the present case, the workman has examined only himself whereas the employer has examined three witnesses, namely the partner Shri Shaikh Noor Mussa, the Manager Shri Vijendra Tari and the machine operator Shri Ramnath Naik. The employer has produced the documents namely the complaint dated 12-6-92 Exb. E-1 of machine operator Shri Ramnath Naik and the xerox copies of the register of employment for the period from June 92 to August 92 Exb. E-2 Colly and has examined the witnesses namely the Manager Vijendra Tari and the machine operator Shri Ramnath Naik have been examined by the employer mainly to prove the absence of the workman on 7th and 8th June, 1992. Both these witnesses have supported the contention of the employer that the workman had remained absent on 7th and 8th June 1992. The documents namely the complaint Exb. E-1 and employment/attendance register Exb. E-2 Colly also do show that the workman was absent on 7th and 8th June, 1992. In the cross examination of the Manager, Shri Vijendra Tari, the workman has suggested to the said witness that he had reported for work but he did not allow him to do so because of his union activities, which suggestion was denied by the said witness. The workman has not led any evidence in support of his contention that he was not allowed to work on 7th and 8th June, 1992 though he reported for work. In his cross examination, he has admitted that he did not meet the partner Shri Shaikh Mussa on 7th and 8th June, 1992 when he was stopped by the Manager from entering the premises and he has further stated that the residence of Shaikh Mussa and the other partner is at a distance of 25 mts. from the theatre. He has also admitted that he did not make any complaint to the employer as regards preventing him from entering the premises by the manager on 7th and 8th June, 1992. In the normal course, if a person is not allowed to work by the manager, his immediate reaction would be to meet the employer or to make a complaint in writing. Admittedly, the workman did not do so. Besides, the workman did not examine any witnesses in support of his contention. In his cross examination, he has stated that he was supported by three employees namely Inacio, Diago Aguiar and Anthony Almeida in forming the union, and that Inacio and Anthony Almeida continue to work with the employer. He has further stated that he had told Anthony Almeida about the incident of preventing him from entering the premises by the manager on 7-6-92. However, he did not examine said Anthony Almeida. Therefore, there is no evidence from the workman that he was not allowed to work by the Manager on 7-6-92 and 8-6-92 though he reported for work. In the circumstances, I am of the view that the employer has succeeded in proving that the workman remained absent from duty on 7th June 1992 and 8th June 1992, and I hold so accordingly.

7. Now, it is the contention of the workman that his services are illegally terminated by the employer. His contention is that he tried to form an union of the employees of the employer and therefore, the employer prevented him from entering the theatre premises and doing his duties from 10th June, 1992. The employer has taken contradictory stand in its defence as can be seen from the written statement and the evidence on record. At para 8 of the written statement, the

employer stated that the workman failed to show cause as to why he remained absent on duty on 7th and 8th June, 1992 and therefore, he was not allowed to join employment till he showed cause for his absence on 7th and 8th June 1992 and hence, he is not entitled to reinstatement in service. At para 10 of the written statement, the employer stated that the workman failed to show cause for his absence on 7th and 8th June, 1992 and hence he is not entitled to reinstatement in service and other benefits. Whereas, in the cross examination of the workman, it was suggested to him that his services were not terminated but he remained absent voluntarily. Shri Shaikh Noor Mussa, the partner of the employer also stated in his deposition that the services of the workman were not terminated but he voluntarily abandoned his services from 9-6-1992. Therefore, the above defences of the employer are self contradictory, because when it is the case of the employer itself that the workman was not allowed to join employment till he showed cause for his absence and that he never showed cause, it cannot be thereafter said that the workman voluntarily remained absent or voluntarily abandoned his service. The absence of the workman after 8th June, 1992 is not voluntarily but it is on account of the act on the part of the employer in not allowing him to join employment because he never showed cause for his absence on 7th and 8th June 1992. Thus, the defence which has been set up by the employer itself supports the contention of the workman that he was prevented from entering the premises and doing his duties from 10-6-92. Besides, Shri Ramnath Naik, the witness for the employer has admitted in his cross examination that the workman had come to the theatre several times after 8-6-92. In the light of what is discussed above, there is no force in the contention of the employer that the workman voluntarily remained absent or absented himself from service, but the act on the part of the employer amounted to refusal of employment to the workman or termination of his services.

8. The contention of the workman is that termination of his services by the employer is illegal and unjustified. The defence which has been set up by the employer as well as the evidence on record shows that the services of the workman were not terminated for misconduct, even assuming that remaining absent unauthorisedly is a misconduct. The services of the workman are terminated for not showing cause for his absence on 7th and 8th June, 1992. The contention of the employer that the workman did not show cause is in fact not correct. The reply to the show cause notice dated 9-6-92 Exb. W-2 has been produced at Exb. W-3 which is dated 22-6-92. In the said reply, the workman has clearly denied that he remained absent on 7th and 8th June, 1992 and has further stated that he was forcibly prevented by the Manager from doing his duties on the said dates. Because the workman denied that he remained absent on 7th and 8th June, 1992, it cannot be said that he failed to show cause. If according to the employer, the workman by remaining absent had misconducted himself, the employer could have charge sheeted him, initiated domestic enquiry and on the report of the enquiry officer could have punished the workman if the report was in favour of the employer. However, the employer did not do this. In my view since the employer has not terminated the services of the workman for any misconduct but for having failed to show cause for his absence on 7th and 8th June, 1992, this amounts to retrenching the services of the workman. Retrenchment has been defined under Sec. 2(oo) of the I. D. Act, 1947 as under:-

> "Retrenchment" means the termination by the employer of the services of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include
>
> (a) Voluntary retirement of the workman; or
>
> (b) Retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contain a stipulation in that behalf; or
>
> (bb) Termination of the services of the workman as a result of non renewal of its contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf concerned therein; or
>
> (c) Termination of the services of a workman on the ground of continued ill health.

As I have mentioned earlier, the services of the workman are terminated not as a matter of punishment inflicted by way of disciplinary action but because according to the employer, the workman failed to show cause for his absence on 7th and 8th June, 1992. The case of the workman also does not fall within the exceptions laid down in Sec. 2 (oo) of the I. D. Act, 1947. Therefore, the termination of the services of the workman amounts to retrenchment.

9. In the case of retrenchment, certain requirements are to be complied with and if the same is not done, the termination is illegal. Sec.25-F of the I. D. Act 1947 lays down the procedure for retrenchment. As per this provision, the services of a workman who is in continuous service for not less than one year cannot be retrenched unless he has been given one month's notice or paid wages in lieu of such notice and he has been paid compensation at the rate of 15 days average wage per each completed year of continuous service or any part thereof in excess of six months. The above conditions are conditions precedend to retrenchment. Sec. 25 B(2) of the I. D. Act, 1947 defines "continuous service". It states that a workman shall be deemed to be in continuous service under an employer for a period of one year if the workman during the period of 12 calendar months preceeding the date with reference to which calculation is to be made, has actually worked under an employer for not less than 190 days in case of a workman employed below ground in a mine and 240 days in any other case. In the present case, the workman was employed as a rewinder in a theatre with effect from 1-5-1989 as can be seen from the letter of appointment Exb.W-1. The employer has not disputed this fact. His services were terminated, according to the workman from 10th June, 1992. The employer has taken the stand that the workman never reported for work after his absence on 7th and 8th June, 1992. Therefore, the workman had worked with the employer for more than 240 days prior to 10th June, 1992 and hence the provisions of sec. 25F of the I.D.Act, 1947 are applicable to the workman. In the light of what is discussed above admittedly, one month's notice was not given to the workman nor he was paid wages in lieu of such notice nor he was paid retrenchment compensation. Therefore, there is no compliance of sec. 25F of the I. D. Act, 1947 from the employer. The Supreme Court in the case of M/s Avon Services Production Agency Pvt. Ltd. V/s Industrial Tribunal, Haryana, and others reported in AIR 1975 SC 170 has held that giving of notice and payment of compensation is a condition precedent in the case of retrenchment and failure to comply with the prescribing conditions precedent for valid retrenchment in Sec.25 F renders the order of retrenchment invalid and in-operative. Since in the present case there is no compliance of the provisions of Sec. F of the I.D. Act, 1947 by the employer, in my view the termination of the services of the workman is illegal and unjustified. In the circumstances, I hold that the termination of the services of the workman by the employer is illegal and unjustified and answer the issue Nos. 1 and 2 accordingly.

10. Issue No. 3:- Having held that the termination of the services of the workman is illegal and unjustified, the next point for consideration is to what relief the workman is entitled. The ordinary rule is that, when the order of termination of service of a workman is held to be illegal and unjustified, he should be reinstated in service with full back wages, unless there are circumstances which do not warranty

reinstatement, or full back wages. In the present case, I do not find any reason to deviate from this rule. The workman in his deposition has stated that he is unemployed. The employer never disputed this fact nor brought in any evidence to the contrary. The Supreme Court in the case of State Bank of India V/s Sundera money reported in AIR 1976 SC 1111 after holding that the termination of the services of the workman was illegal for not complying with the provisions of Sec. 25 F of the I.D. Act, 1947 awarded reinstatement to the workman with full back wages. In para 10 of its Judgment, the Supreme Court held as follows:-

"What follows? Had the State Bank of India know the law and acted on it, half month's pay would have concluded the story. But that did not happen. And now, some years have passed and the bank has to pay for no service rendered. Even so, hard cases cannot make bad law. Reinstatement is the necessary relief that follows."

In the present case also, the services of the workman were terminated without complying with the provisions of Sec. 25F of the I. D. Act, 1947. There is also no evidence that the workman was gainfully employed. Therefore, it is just and proper to award reinstatement to the workman with full back wages. I therefore hold that the workman is entitled to reinstatement in service with full back wages and other consequential benefits.

In the circumstances, I pass the following order:-

ORDER

It is hereby held that the action of the management of M/s Cine Aaisha, Ponda, in terminating the services of the workman Shri Cresy Fernandes, Rewinder, with effect from 10-6-92 is illegal and unjustified. The workman Shri Cresy Fernandes is ordered to be reinstated in service with full back wages and other consequential benefits.

No order as to costs.

Inform the Government accordingly.

Sd/

(AJIT J. AGNI)
Presiding Officer
Industrial Tribunal

Order

No. CL/Pub-Award/97/8040

The following Award dated 6-3-1998 in Reference No. IT/9/90 given by the Industrial Tribunal, Panaji-Goa, is hereby published as required under the provisons of Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order in the name of the Governor of Goa.

R. S. Mardolker, Ex-Officio Joint Secretary (Labour).

Panaji, 25th March, 1998.

IN THE INDUSTRIAL TRIBUNAL
GOVERNMENT OF GOA
AT PANAJI

(Before Shri Ajit J. Agni, Hon'ble Presiding Officer)

Ref. No. IT/9/90

Shri Vishnu P. Kamat.
Near Navdurga Temple, Borim,
Ponda Goa. — Workman/Party I
V/s
M/s Madras Rubber Factory Limited,
Tisk, Usgaon,
Ponda, Goa. — Employer/Party II

Workman/Party I represented by Adv. Shri L. V. Talaulikar.

Employer/Party II represented by Adv. Shri G. K. Sardessai.

Dated:- 06-03-1998.

AWARD

In exercise of the powers conferred by clause (d) of sub-section 1 of Section 10 of the Industrial Disputes Act, 1947, the Government of Goa by order dated 20-3-90 bearing No. 28/5/90-LAB referred the following dispute for adjudication by this Tribunal.

1. Whether Shri Vishnu P. Kamat, Quality Assurance Supervisor of M/s MRF Limited, Tisk Usgao, Ponda-Goa is a workman under section 2(s) of the Industrial Disputes Act, 1947 (Central Act 14 of 1947)?

2. If so, whether the action of the management of M/s MRF Limited, Ponda, in terminating the services of Shri Vishnu P. Kamat, Quality Assurance Supervisor, with effect from 28-9-1989 is legal and justified?

3. If the answer to (2) above is negative, to what relief the workman is entitled?"

2. On receipt of the reference, a case was registered under No. IT/9/90 and registered A/D notice was issued to the parties.

In pursuance to the said notice, the parties put in their appearance. The workman/party I (For short "Workman") filed his statement of claim which is at Exb. 2. The facts of the case in brief as pleaded by the workman are that he was employed with the employer/Party II (For short "Employer") as a Production Supervisor w.e.f. 5th July, 1978 as per the letter of appointment dated 5th July,, 1978. That on or about 1-7-1979, he was appointed on probation and was confirmed as Production Supervisor with effect from 1-1-1980. That he worked in the final inspection section and was sent on intermitent deputation at the factory of "Shetye Tyres" at Bicholim and he was required to check up the quality of flaps which were being manufactured by the M/s Shetye Tyres for the employer on contract basis. That as a Production Supervisor, his duties were (1) to check dimensions, temperature and pressure of machinery, materials, fluids and check the flow of the cooling waters of concerned machinery in the process control section; (2) to check cleanliness and proper use of materials and machinery in the process control section as per the prescribed specifications; (3) to prepare the daily report of above checks; (4) to detect manufacturing defects, if any, in the manufacturing process and bring them to the notice of the concerned officials including the Manager, Quality Assurance or the Shift Foreman in his absence; (5) to prepare report of the above checks; (6) to inspect finished products

and prepare report of the same and (7) to maintain record of the goods transferred from finishing department to final inspection section of Quality Assurance Department. That he carried out the above work with full zeal and enthusiasm and without any grievance from higher officials. That, to his surprise, on 5-4-88, he was summoned by the manager, Quality Assurance, to his cabin and orally informed him that his services are no more required in his department. That thereafter, a chargesheet dated 14-4-88 alongwith suspension order dated 5.4. 88 was sent to him by post, alleging that he had made a false report of his work constituting gross misconduct and he was asked to submit his written explanation. That he submitted his explanation on 19.5.88 denying the charges and by notice dated 13.6.88, the management informed him that an enquiry would be held into the charges on 22.6.88. That the workman requested for the postponement of the enquiry to 25.6.88, and also required that he should be permitted to be represented by a legal adviser. That, he was informed that the enquiry was postponed to 29.6.88 and he was asked to place his request of representation before the enquiry officer, and subsequently, he received a letter dated 30.6.88 from the management informing that the enquiry was held on 29.6.88 and he also received a letter from the enquiry officer on 30.6.88 stating that all points of enquiry should be placed before him for consideration during the enquiry itself. That by letter dated 5.7.88, the workman gave reasons as to why the assistance of the legal adviser was necessary and also stated that denying this facility would amount to violation of principles of natural justice. That except for communicating the change of date of enquiry by letter dated 7.7.88 and the report of the proceeding dated 20.7.88 by letter dated 23.7.88, no further communication was received by the workman from the employer and only when he received a letter dated 6.9.89 alongwith the copy of the enquiry proceedings and the findingss of the enquiry officer, he learn that the enquiry proceedings were conducted ex-parte against him. That, by letter dated 16.9.89, he replied to the show-cause notice given by the employer and demanded that the enquiry should be held de novo. That thereafter, he received a letter dated 28.9.89 from the employer informing him that he is dismissed from service with immediate effect. The workman contended that the charges levelled against him are false, fabricated and misconceived and the enquiry was conducted against him in violation of the principles of natural justice. The workman contended that the termination of his services by the employer is illegal and unjustified and therefore, he is liable to be reinstated in service with full back wages.

3. The employer filed written statement which is at Exb. 3. The employer stated that the workman is not a "workman" as defined in Sec.2 (s) of the I. D. Act, 1947 as he performed essentially supervisory duties and he was drawing wages of more than Rs. 1600/- p.m. at the time of termination of his service. The employer stated that the quality Assurance Department is one of the most vital department because it is alert and it ensures a high degree of quality of the product because of which the tyres are in a position to have a high standing in the competitive market. The employer admitted that the workman was employed as a Quality Assurance Supervisor at the Factory and stated that apart from the duties mentioned in the claim statement, he was also required to check all the parametres in the check list given to him and report violations if any, and also go through the log book maintained in the department for any specific instructions recorded therein. The employer however, denied that the workman was performing his duties with zeal and enthusiasm or that his service records were good and unblemish. The employer denied that the workman was orally informed that his services were no more required in his department or that no advise or communication was served on him before he was suspended. The employer stated that the workman was to be suspended on 5.4.88 but as he was absent on that day and continued to be absent, the order could not be served on him and hence it was sent to him at his last known address by registered AD post, and when the employer learnt that the workman had shifted his residence at Borim, the chargesheet dated 14.4.88 alongwith the copy of the suspension order was sent to him at his Borim address. The employer stated that the workman was given every opportunity by the enquiry officer to present himself before him and present all his submissions, but the workman choose to remain absent and hence the enquiry was rightly conducted ex-parte. The employer denied that the charges levelled against the workman were false, fabricated, misconceived or that they were made with malafide intention and ulterior motive. The employer stated that the charges were proved against the workman in the enquiry conducted by the enquiry officer, which were grave and warranted extreme punishment of dismissal. The employer denied that its action of dismissing the workman from service is malafide, unjust or illegal. The employer also denied that the workman is entitled to reinstatement in service with full back wages or any other relief. The employer contended that the termination of the services of the workman is legal, justified and proper which is commensurate with the gravity of the proved misconducts. Thereafter, the workman filed rejoinder which is at Exb. 4, controverting pleadings made by the employer in the written statement.

4. On the pleadings of the parties issues were framed at Exb. 5 and the issue No. 1 was treated as preliminary issue. As per the said issue, burden was cast on the workman to prove that he is a workman as defined in Sec. 2(s) of the I. D. Act. 1947. However, the issues were subsequently reframed on 3.7.91 Exb. 6 and the burden was cast on the employer to prove that the workman is not a "workman". The issues framed are as under:—

Issue No. 1:— Does Party II/Employer prove that party I is not a workman as defined in Sec. 2 (s) of the I. D. Act?

Issue No. 2:— If not, does Party I prove that the domestic enquiry held by the officers of Party II was not legal and proper and that it was against the principles of natural justice?

Issue No. 3:— If not, whether Party I proves that the order or termination passed by the Party II against him is not legal, proper and justified?

Issue No. 4:— If Yes, whether Party I is entitled to any relief?

Issue No. 5:— What award or order?

Both the parties led evidence on the said issue No. 1 which was treated as preliminary issue and my findings on the issues are as follows:—

Issue No. 1 : — In the affirmative

Issue No. 2 : — Does not arise

Issue No. 3 : — Does not arise

Issue No. 4 : — Does not arise

Issue No. 5 : — As per order below

REASONS

5. *Issue No. 1:*— Adv. Shri G. K. Sardessai, the learned counsel for the employer submitted that though the issue No. 1 casts burden on the employer to prove that the workman is not a"workman" within the definition of section 2(s) of the I. D. Act, 1947, still the assessment of the same is to be done in line with the reference which is made by the Government. He submitted that as per the terms of the reference, the burden is on the workman to prove that he is a "workman" within the definition of Sec. 2 (s) of the Act, because the reference itself says "whether Shri Vishnu P. Kamat, Quality Assur-

ance Supervisor of MRF Limited is a workman under Sec. 2 (s) of the I. D. Act, 1947" and three is no presumption in such a case. He submitted that to decide whether a person is a workman or not, what is required to be seen is the dominant nature of work performed by that person. He has submitted that the dominant nature of work performed the workman is that of a supervisor. He submitted that recording measurements, sanctioning of leave, to give permission are the instances of the supervisory work. In support of his contention he relied upon the decision of the Bombay High Court in the case of Ramesh Ramrao Wase V/s The Commisioner, Revenue Division, Amravati, reported in 1996 I LLJ 55. He also referred to the para 7 of the statement of claim and para 1 of the Rejoinder filed by the workman and submitted that the averments made in the said paras clearly show that the work which was being performed by the workman was a supervisory nature only and it is his own admission. Adv. Shri Sardessai submitted that the importance of the Quality Control department and the reasons for issuing the chargesheet to the workman has been pleaded by the employer at paras 1, 2, 3 and 9 of the written statement. He lastly submitted that from the deposition of the workman recorded before this Tribunal on the preliminary issue shows that the workman was performing supervisory duties and hence he is not a workman within the meaning of the Act.

6. Adv. Shri Talaulikar, the learned counsel for the employer on the other hand submitted that the workman was appointed as Production Supervisor as per the letter of appointment Exb. 17 and subsequently he was confirmed by letter dated 15.4.80 Exb. 18. He submitted that though initially the burden was cast on the workman to prove the issue whether he is a "workman" within the definition of Sec. 2(s) of the I.D. Act., 1947 or not, thereafter, the said issue was reframed and the burden was cast in the employer to prove that the workman is not a "workman" as defined under the Act, and the employer has failed to discharge the said burden. He submitted that the duties performed by the workman have been stated at para 7 of the statement of claim which are not denied by the employer in its written statement except for contending that the workman was not doing the said duties personally. He submitted that the said duties which were being done by the workman were of clerical nature and physical work was involved in the same. He contended that to find out whether a person is a "workman" or not, what is to be seen is the work carried out by the said person and not what is his designation. He submitted that the evidence on record, oral as well as documentary, shows that the workman had no powers to sanction leave and the sanctioning authority is the sectional head. He submitted that the workman was not supervising over the subordinates but he was supervising over the materials. In support of his various contentions, Adv. Shri Talaulikar relied upon (1) The decision of the Supreme Court in the case of Ananda Bazar Patrika V/s Its workmen reported in 1969 II LLJ 670 (2) The decision of the Supreme Court in the case of Burmah Shell Oil Storage & Distribution Co. of India Ltd. V/s The Burmah Shell Management Staff Association reported in AIR 1971 SC 922 (3) The decision of the Supreme Court in the case of Punjab Coop. Bank Ltd. V/s. R. S. Bhatia reported in AIR 1975 SC 1898 (4) The decision of the Supreme Court in the case of National Engineering Industries Ltd. V/s Shri Krishan Bhageria, reported in AIR 1988 SC 329 (5) The decision of the Supreme Court in the case of Ved Prakash Gupta V/s M/s Deltron Cable India (Pvt.) Ltd. reported in AIR 1984 SC 914 (6) The decision of the Supreme Court in the case of M. K. Maini V/s Carona Sahu Co. Ltd. reported in AIR 1994 SC 1824 (7) The decision of the Calcutta High Court in the case of Titaghur Paper Mills Co. Ltd. V/s First Industrial Tribunal, West Bengal and others, reported in the case of M/s Blue Star Ltd. V/s N. R. Sharma and others; reported in 1995 II LLJ 300.

7. I have carefully considered the arguments advanced by both the learned counsels. I agree with the contention of Adv. Shri Sardessai that when the reference itself mentions whether the concerned employee is a workman or not within the meaning of Sec. 2 (s) of the I. D. Act, 1947, the burden should be on the concerned employee to prove that he is a workman as there is no presumption in such case that he is a "workman". The records show that intially the issue was correctly framed by my learned predecessor casting the burden on the workman to prove that he is a "workman". However, subsequently, the issue was framed by order dated 3.7.1991 whereby the burden was cast on the employer to prove that the workman is not a "workman" as defined under the Act. The record also show that the employer had subsequently made an application for reframing the issue again thereby casting the burden on the workman. This application was made after the employer had closed its evidence on the preliminary issue and the workman was cross-examined. My learned Predecessor rejected the request of the employer to reframe the issue again by order dated 8.5.1993, but allowed the employer to lead additional evidence in rebuttal, which the Employer did. Therefore, the records show that full opportunity was given to the workman as well as the employer to lead evidence on the preliminary issue and the parties led evidence. Since the employer was given an opportunity to lead additional evidence in rebuttal, and the employer did lead the evidence, no prejudice can be said to have been caused to the employer by casting the burden on it to prove that the "workman" is not a workman. Ultimately, it is a matter of assessment of evidence led by both the parties on the preliminary issue.

8. In the present case, it is not in dispute that the workman was appointed as a Production Supervisor and subsequently, he was confirmed as Production Supervisor with effect from 1-1-1980. The contention of the employer is that the workman was performing essentially supervisory duties in Quality Assurance Department and was drawing wages of more than Rs. 1600/- per month at the time when his services were terminated, and therefore, he is not a "Workman" within the meaning of Sec. 2 (s) of the I. D. Act, 1947. Shri Talaulikar, the learned counsel for the workman has submitted that in deciding whether a person is a "workman" or not, the designation given to him is not the decisive factor but what is relevant is the nature of duties performed by him. He has relied upon the decision of the Supreme Court in the case of Ananda Bazar Patrika (Supra) and Burmah Shell Oil (Supra). In both these decisions, the Supreme Court has held that to decide whether a person is a workman or not, what is required to be seen is the main work carried out by that person and the incidental work done by him. The Bombay High Court in the case of S. A. Sarang V/s W. G. Forge Allied Industries Ltd; Thane and others reported in 1995 I CLR 837 has held that it is a settled law that it is the actual work done by the employee which is determinative of whether he falls within the scope of the definition of "workman" under Sec. 2(s) of the Act and not his designation. It is therefore clear that merely because the workman was appointed as a Production Supervisor, it does not mean that he was performing supervisory duties and was falling within the exceptions contained in clause (iv) of Sec. 2 (s) of the I. D. Act, 1947. What is required to be considered is the principle or main duties performed by him.

9. The employer as well as the workman have led evidence on the preliminary issue. The employer has examined Shri Ratnakar Amonkar, the Asst. Manager, Quality Assurance and the workman has examined himself. Shri Ratnakar Amonkar, the employer's witness has stated that the workman was working as a Supervisor in the Quality Assurance section and he was in charge of verifying the quality of various process and had to see the quality by inspection from raw materials to the finished stage. He has stated that he was responsible for random checks of all the products manufactured, ensure that the product falls within the tolerance limit, take the check list and examine every process of the products; supervise other aspects and record them in the reports which are useful for finding out the defects of any products; inform the Production Supervisor in case any defect in production is found and stop the production by placing defective material slip; educate the worker for maintaining quality of products. Shri Amonkar has produced the leave application card Exb. 23 of Shri

Desai to show that his leave was sanctioned by the workman. He has also produced the leave application cards of Mr. Kanolkar, Mr. Borkar, Mr. P. Amonkar, Mr. D. Gaude, Mr. K. Muttappa, Mr. P. Sawant and Mr. K. Gaunkar, at Exhibits 32, 39, 40 and 41 colly, to show that their leave was sanctioned by Mr. Salunke, Mr. Palekar, Mr. Stephen Noronha, Mr. S. Chodnekar, Mr. N. Kamat, Mr. Motilal Tuppe and Mr. F. Lawrence who were working as supervisors in the Quality Assurance Department. In the cross examination of the witness Mr. Amonkar, it is suggested to him that as per the leave application card, only the sectional head could sanction the leave and not the supervisor, which suggestion is denied by the said witness. It is also suggested to him that the supervisor puts the signature in the leave application card in token that the Operator whose leave is sanctioned was working under him, which suggestion is denied by him. The witness Mr. Amonkar has also produced the report given by the Supervisor Mr. D. Felix to the Plant Quality Assurance Manager Mr. M. Rebeiro at Exb. 37 about the detection of quality violation. In the cross-examination, Mr. Amonkar has denied that at the time of final checking or preparing the checklist any manual or physical work on the part of the supervisor is involved. He has stated that the supervisor do not do any manual work and that the physical work is done by the Operators. He has further stated in his cross examination that the Operators do the work of lifting the materials and tyres and the supervisor does the work of checking. He has denied that the Operators are concerned only with the production department. He has stated in his cross that the preparation of compounds and other materials is done by the Production Department as well as the Technical Department which are kept in polythene bags and about 3 to 4 bags are checked for random check by the workmen. He has also stated in his cross that the Operator puts the threads on the weighing machine and the supervisor checks the weight, dimension and appearance. He has further stated that the supervisor prepares the defect slip in case he finds any defect and he records it in defect register and his opinion is final. He has stated that the Technical Department takes the final decision on the defect material as regards disposal. The workman has examined himself. In his deposition, he has stated that he was attached to the Quality Assurance Department and his duty was to inspect the materials, process the instruments and the machinery. However, he stated that his duty was not to supervise over the work of the other employees. He has stated he had to fill 10 forms in Preparation I and 15 forms in Preparation II and before filing up these forms, some manual labour was involved, and he had to do all the work himself without the assistance from any workman. In his cross-examination, he has stated that the batches of raw rubber has to be mixed to the schedule proportion and this mixing is done by the Operator. He has stated that some other ingredients are required to be mixed in the raw rubber and they are to be properly weighed. He has stated that he has to check the weight of the ingredients which are weighed by the Operators. He has admitted that he used to check the temperature of the mixed materials and it was his duty to point out to the Production Supervisor about the variations in the temperature. He has stated that it is quite possible that material would be spoilt by higher or lower temperature. He has admitted that he was responsible for checking at randum whether the mixing is done properly or not and if it is not, he used to point it out to the Production Supervisor. He has stated that he knows Mr. Rajendra Salunke, Mr. Palekar, Mr. Stephen Noronha and Mr. Rajendra Kolwalkar who were working as Supervisors but he denied that they had authority to sanction leave. He has admitted that it was his duty to check that the thread is cut to proper dimension and if the cutting of the thread is not proper, it has to be stopped immediately. He has admitted that he was posted in Shetye Tyres at Bicholim and he was responsible for the inspection of flap production and preparing excise gate pass, and in case the flap was defective, he used to segragate it. He has admitted that he used to submit monthly production report to his superiors during his assignment with Shetye Tyres, and he admitted the report submitted by him which is produced at Exb. 24. He admitted the record of the checks of quality control produced at Exb. 27 which is in his handwriting, and stated that the wordings "scrapped for length" noted therein are with reference to the length of the thread which he recommended for re-cycling. He has further stated that he recommended it because it was not according to the specification. He also admitted that the quality of the product is important for the organisation.

10. Adv. Shri Talaulikar, the learned counsel for the workman has relied upon the decision of the Supreme Court (1) in the case of Punjab Coop. Bank Ltd. (Supra); (2) in the case of Ved Prakash Gupta (Supra); (3) in the case of National Engineering Industries Ltd. (4) in the case of Carona Sahu Co. Ltd., the decision of the Calcutta High Court in the case of Titaghur Paper Mills Co. Ltd. (Supra) and the decision of the Delhi High Court in the case of M/s Blue Star Co. Ltd. (Supra). I have gone through the said decisions. In the case of Punjab Coop. Bank Ltd. (Supra) the issue involved was whether the respondent who was the Accountant in the Petitioner Bank was a workman. The Supreme Court held that merely because the respondent was signing the salary bills of the staff including himself did not mean that he was employed mainly in a managerial or administrative capacity and no evidence was produced to show that any managerial or administrative duty was entrusted to the respondent while he was working as a mere Accountant. In the case of Ved Prakash Gupta (Supra) the Supreme Court held that the appellant Ved Prakash Gupta was a workman because the evidence on record showed that the substantial part of his work was only that of a Security Inspector and it was neither managerial nor Supervisory thought he might have been doing some other items of work such as signing identity cards or workman etc. In the case of National Engineering Industries Ltd. (Supra) the Supreme Court held that since the duties of the Internal Auditor of the company were that of reporting and checking up on behalf of the management and he had not independent right or authority to take decision, he was a workman and not a supervisor. The Supreme Court held that one must look into the main work and that must be found out from the main duties. The same principles are laid down by the Supreme Court in the case of M/s. Carona Sahu Co. Ltd. (Supra). In the case of Tataghur Paper Mills Co. Ltd. (Supra) the Calcutta High Court has held that Supervisor as understood in Sec. 2 (s) of the I. D. Act really means that the person exercising supervisory work is required to control the man and not the machines. His duty is to see how the employees will be engaged in different works of production and maintenance. In the case of M/s Blue Star Limited, the Delhi High Court has held that the essence of supervisory nature of work is the supervision by one person over the work of others.

11. Admittedly, the workman was working in the quality Assurance Department. This department is a vital department of the employer/company because it controls the quality of the tyres manufactured by the company. The workman in his evidence has admitted that the quality of the product is important for the organisation. Now, the question is whether the workman was employed in supervisory capacity. This has to be found out from the main duties or work which were being performed by the workman. The evidence on record as to the duties or work done by the workman has been mentioned by me hereinabove. Looking into the said duties or work, it is evident that the workman was employed in supervisory capacity and his main duties were of supervisory nature. In his evidence, he has admitted that the batches of raw rubber was required to be mixed to the scheduled proportion and the mixing is done by the Operators. He admitted that he used to check the temperature of the mixed materials and it was his duty to point out to the production supervisor about the variation in the temperature. He has also admitted that he was responsible for checking at randum whether the mixing is done properly or not and if it is not, he was pointing it out to the production supervisor. He has stated that some ingredients are required to be mixed in the raw rubber and he had to check whether the ingredients are properly weighed or not by the Operators. He has admitted that if the cutting of the thread is not done properly, it has to be stopped

immediately, and he has admitted that it was his duty to check that the thread is cut to the proper dimension. The machine by which the thread is cut is operated by the operator. All these things clearly show that the workman was supervising over the work which was done by the Operators. Besides, in the cross examination of Mr. Ratnakar Amonkar, the witness for the employer, it was suggested to him that the supervisors put their signature in the leave application card in token that the operators whose leave is sanctioned were working under them. This amounts to an admission on the part of the workman that the Operators were working under him because the above suggestion was put to the witness in reference to the leave application cards produced by the employer to show that the supervisors including the workman had sanctioned the leave of some operators. Shri Ratnakar Amonkar, the witness for the employer has stated that the workman use to stop the production of the product in case he found any defect in the production and he used to inform the same to the concerned production supervisor. He has stated that the workman used to stop the production by placing the defective material slip. In his cross-examination, he admitted that the defect slip is subject to the final verification and decision of the higher authority and the Technical Department. However, the fact remains that the workman had the independent authority to stop the production initially if the defect in the production was detected by his. Similarly, he had also the independent authority to stop the cutting of the thread if it was not cut to proper dimensions. He has also stated in his cross-examination that he was recommendation the re-cycling in case the length of the thread was not according to the specification. All these things clearly indicate that the workman was exercising independent authority. One of the factors to ascertain whether the person was employed in Supervisory capacity is to find out whether he had the powers to sanction leave. In this respect, the employer has produced the leave application cards of various operators at Exb. 23, 32, 39, 40, 41 colly. These leave application cards show that the concerned supervisors had sanctioned the leave of the operator mentioned in the card, as the said supervisors have signed within the column "sanctioning authority/date". The leave application card of the operator Mr. Dessai has been produced at Exb. 23. The workman has admitted that he has signed the said leave application card under the column "Sanctioning authority". If it is the case of the workman that the supervisors put their signature in the leave application cards of the operators in token that the operators whose leave was sanctioned were working under them, the workman ought to have examined any supervisor or the Operator to substantiate this contention. This was required because the leave application cards on the face of it show that the leave of the operator was sanctioned by the supervisor including the workman, even though the law is that the documentary evidence cannot be substituted by any oral evidence. The employer's witness Shri Ratnakar Amonkar has stated that the supervisors are not the members of the Union nor do they have any association nor they are bound by standing orders nor they are covered by the settlement which are extended to the Operators. This statement of Shri Amonkar has not been challenged by the workman. Adv. Shri Sardessai, the learned counsel for the employer has relied upon the decision of the Bombay High Court in the case of Ramesh Ramrao Hade (Supra) in support of his contention that the duties performed by the workman were of supervisory nature and hence he is not a "workman" as defined under the I. D. Act. I have gone through the said decision of the Bombay High Court and I am of the view that the same decision squarely applies to the facts of the present case. In that case, the petitioner was employed as a Sectional Engineer at Panchayat Samiti. The contention was raised by the Petitioner that his duties were not of supervisory nature but were of Technical nature. In the affidavit filed before the Hon'ble High Court be enumerated the duties which were being performed by him such as to prepare the plans and estimates of the sanctioned works like buildings, roads and drains etc. after getting the instructions from his superiors and under the guidance of the Deputy Engineer/Executive Engineer working under the respondent's establishment; to give layout/marking of foundation of works as per sanctioned plans, the lines for foundation of works being marked by him; to record measurement of completed and running works in the measurement book and to prepare the bills of works and to work out the valuation of the completed works by Gram Panchayats; to give Technical guidance to the agency like Gram Panchayats and Contractors and to collect and submit information of works to the heads of department that is to perform the reporting work. The Petitioner had stated in the affidavit that he was neither the head of the department nor the head of the office and was performing duties as per the instructions from his head of office and that he had no power of distribution of work, detect fault, report for penalty, make arrangement for filling vacancies, no power of supervisory control over the sub-ordinates; not empowered to sanction leave, give promotion, or to sanction increments, or to take disciplinary action against the employees if they committed any mistake. The Bombay High Court held that the above duties performed by the Petitioner were of supervisory nature and not of Technical nature. The Bombay High Court held that if supervision is required to be made over the quality of the work and over other aspects such as to see and examine whether the work is complete or not in satisfactory manner and in keeping with the specifications that also becomes the supervisory work. The Bombay High Court held that even if the Petitioner was required to do the work as per the instructions of the Block Development Officer or Deputy Engineer, that does not give him the character of a workman. The Bombay High Court further held that the term "Supervisory work" does not mean that concerned person must have control over the subordinates and the person concerned should have the power to sanction leave, give promotion etc. as it is only one of the facts of the supervisory work. This decision of the Bombay High Court applies to the present case as the workman was working in the Quality Assurance Department which is concerned with the quality of the production of the tyres. He has to see that the work is done by the operators satisfactorily according to the specifications and stop the process of production in case any defect was found by placing the defective slip. He could also stop the cutting of the thread if it was not cut to proper dimension. The above evidence therefore shows that the workman had the direct control over the work done by the operators whereas the Bombay High Court in the said case of Ramesh Ramrao Wase recognised even the indirect control over the work when it observed that if the Petitioner has the power to do measurement work, he certainly has the power of detect the incomplete work and not to include it in the measurement book. Another fact which supports the contention of the employer that the workman was performing essentially supervisory duties is that the workman has admitted in his cross examination that there were 4 operators working in each shift and he has signed the final inspection work sheet Exb. 21. This also indicates that the operators were working under him. Therefore, considering the evidence on record which has been discussed by me above and in the light of the decision of the Bombay High Court in the case of Ramesh Ramrao Wase (Supra) I hold that the workman was performing the duties mainly of a supervisory nature. The submitting of the reports and filling of the forms was the incidental work. Shri Amonkar, the witness for the employer has stated that the workman was drawing about Rs. 3,000/- p. m. as salary. This is not disputed by the workman. The workman himself in his desposition has stated that he was getting Rs. 2085/- in total. In his cross-examination, he stated that his basic pay was more than Rs. 1600/- and his total emoluments were not more Rs. 3,000/- prior to termination of his services. Therefore, at the time when the services of the workman were terminated, he was drawing salary of more than Rs. 1,600/- p.m.

12. Sec. 2 (s) of the Industrial Disputes Act, 1947 defines "workman". As per Sec. 2(s) (iv) a person who is employed in a supervisory capacity and who draw wages exceeding one thousand six hundred rupees per month is not a "workman". He is an exception and does not fall within the meaning of "workman" as defined under Sec.2 (s) of the Act. In the present case, I have held that the workman Shri Vishnu Kamat was performing duties mainly of supervisory nature and since he was drawing wages of more than Rs. 1,600/- p. m. at the time when his services were terminated, he falls within the exceptions to the definition of "workman" as defined under Sec. 2 (s) of the I. D. Act, 1947, and hence he is not a "workman". I therefore, hold that the workman Shri Vishnu P. Kamat is not a "workman" as defined is Sec. 2(s) of the I. D. Act, 1947 and answer the issue No. 1 in the affirmative.

13. The appropriate Government can make a reference of only an Industrial Dispute for adjudication by the Industrial Tribunal and not any other dispute. What is Industrial dispute has been defined under Sec. 2(k) of the I. D. Act, 1947. As per the said definition of "Industrial dispute", the dispute or difference must be concerning a workman and if it is not concerning a workman, there is no industrial

dispute. Who is a workman has been defined under Sec.2(s) of the I. D. Act, 1947. After analysing the evidence on record, I have held that the workman Shri Vishnu Kamat is not a "workman" as defined under Sec. 2 (s) of the I. D. Act, 1947. This being the case, the dispute which is referred by the Government is not an "industrial dispute". Since there is no Industrial dispute, I hold that the reference made by the Government is bad in law and not competent, and the same is liable to be rejected. Since the reference itself is held by me to be bad in law and not competent, the question of deciding other issues or granting any relief to the workman does not arise, and I hold so accordingly.

In the circumstances, I pass the following order.

ORDER

It is hereby held that Shri Vishnu P. Kamat, the Quality Assurance Supervisor of M/s MRF Limited, Tisk Usgaon, Ponda Goa is not a workman under Sec. 2 (s) of the I. D. Act, 1947. It is hereby further held that the dispute referred by the Government is bad in law and not competent as there is no industrial dispute. The reference made by the Government is therefore rejected.

No order as to cost.

Inform the Government accordingly.

Sd/-

AJIT J. AGNI,
Presiding Officer
Industrial Tribunal

Order

No. CL/Pub-Awards/98/8955

The following Award dated 23-4-1998 in Reference No. IT/49/97 given by the Industrial Tribunal, Panaji-Goa, is hereby published as required under the provisions of Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

R. S. Mardolker, Ex-Officio Joint Secretary (Labour).

Panaji, 26th May, 1998.

IN THE INDUSTRIAL TRIBUNAL
GOVERNMENT OF GOA
AT PANAJI

(Before Shri Ajit J. Agni, Hon'ble Presiding Officer)

Ref. No. IT/49/97

Workmen, Rep. By the President,
Kamgar Sena, Shiv Sena,
Central Office, Carcalho Building,
Mapusa, Bardez Goa. — Workmen/Party I

V/s

M/s Bardez Consumer's Co-operative
Society Ltd.,
Morod, Mapusa,
Bardez Goa. — Employer/Party II

Workmen/Party I - Absent.
Employer/Party II represented by Adv. Shri A. V. Nigalye.

Dated:- 23-4-1998.

AWARD

In exercise of the powers conferred by clause (d) of sub-section (1) of section 10 of the Industrial Disputes Act, 1947, the Government of Goa by order dated 1-9-1997 bearing No. IRM/CON-MAP/ /(69)/97/4466 referred the following dispute for adjudication to this Tribunal.

1. Whether the action of the management of M/s Bardez Bazar Consumer's Co-operative Society Ltd., Mapusa Goa, in terminating:-

1. Shri Vinod Khalap, Branch Manager, Khorlim Branch, to Mapusa Branch w. e. f. 30-4-1997;

2. Shri Manohar Gadekar, Branch in-charge of Tivim Branch, to Mapusa Branch as Cashier w. e. f. 30-4-1997;

3. Shri Uday Munj, Branch in-charge of Mapusa Branch, to Khorlim Branch as Branch in-charge w. e. f. 30-4-1997 and;

4. Shri Sanjay Aradkar, Clerk, Mapusa Branch to take over the charge from Manohar Gadekar w. e. f. 30-4-1997 is legal and justified?

2. Whether the transfer of Shri Vinod Khalap, Shri Manohar Gadekar, Shri Uday Munj and Shri Sanjay Aradkar with changed designations respectively to their present place of posting amounts to demotion in service?

3. If not, to what reliefs the four workmen are entitled?"

2. On receipt of the reference, a case was registered under No. IT/4/ /97 and registered A/D notice was issued to the parties who were duly served with the said notice. On 21-10-97 when the case was fixed for filing of the statement of claim by the Workmen/Party I (For short "Workmen"), Shri Prakash Samant, the President of the Union appeared and prayed for time to file the statement of claim, which was granted. The employer/Party II (For short "Employer") was represented by Adv. Shri A. V. Nigalye. On 10-11-97, Adv. Shri L. V. Talaulikar appeared on behalf of the Union and undertook to file the authority letter. At his request, the case was adjourned to 2-12-97 for filing of the statement of claim by the Union. On the said date, the case was again adjourned to 6-1-98 at the request of Adv. L. V. Talaulikar for filing of the statement of claim by the Union. On the said date, i. e. on 6-1-98, Adv. Shri Talaulikar filed an application stating that he does not want to appear on behalf of the Union. In view of this fact, a fresh notice was ordered to be issued to the Union for filing the statement of claim on 3-2-98. Accordingly, a fresh registered A/D notice was issued to the Union and the said Union was duly served with the said notice. On 3-2-98, none appeared on behalf of the Union and only Adv. Shri Nigalye appeared on behalf of the Employer. He submitted that he does not want to file any statement of claim on behalf of the Union and prayed that Award be passed rejecting the reference.

3. The reference of the dispute was made by the Government at the request of the Union as they challenged the action of the employer in transferring the services of the above said workmen. It is a settled law that the party who challenges the legality of the order or the action taken by the employer, the burden lies on that party to prove the legality of the said order or the action. The Allahabad High Court in the case of V. K. Raj Industries V/s Labour Court and others reported in 1981 (29) FLR 194 has held that the proceedings before the Industrial court are judicial in nature even though the Indian Evidence Act is not applicable to the proceedings before the Industrial Court but the principles underlying the said Act are applicable. The High Court has held that it is well settled law that if the party challenges the validity of an order, the burden lies upon him to prove

the legality of the order and if no evidence is produced, the party invoking the jurisdiction must fail. The High Court has further held that if the workman fails to appear or to file Written Statement or to produce evidence, the dispute referred by the Government cannot be answered in favour of the workman and he would not be entitled to any reliefs. The Bombay High Court, Panaji bench in the case of V. N. S. Engineering Services V/s Industrial Tribunal, Goa, Daman & Diu and another reported in FJR Vol. 71 at page 393 has held that the obligation to lead evidence to establish an allegation is on the party making an allegation, the test being that he who does not lead evidence must fail. The Bombay High Court further held that the provisions of Rule 10B of the Industrial Disputes (Central) Rules, 1957 clearly indicates that the party who raised an industrial dispute is bound to prove the contentions raised by him and the Industrial Tribunal would be erring implacing the burden of proof on the other party to the dispute.

4. In the present case, the dispute was raised by the Union that the action of the employer in transferring the workmen S/Shri Vinod Khalap, Manohar Gadekar, Uday Munj and Sanjay Aradkar is illegal and unjustified and that their transfer with changed designation amounts to demotion in service. Therefore, applying the law laid down by the Allahabad High Court in the above referred cases, the burden was on the Union to prove that the action of the employer in transferring the above said workmen w. e. f. 30-4-97 was illegal and unjustified. However, inspite of the opportunities given, the Union did not put in their appearance nor they filed any statement of claim in support of its case. It is therefore clear that the Union is not interested in pursuing further with the matter. There is therefore, no material before me to hold that the action of the employer in transferring the above said workmen w.e.f. 30-4-97 is illegal and unjustified or that their transfer with changed designation amounts to demotion in service. In the absence of any evidence, the reference cannot be answered in favour of the Union. In the circumstances, I hold that the Union has failed to prove that the action of the employer in transferring the above said workmen w.e.f. 30-4-97 is illegal and unjustified, or that their transfer with changed designation amounts to demotion in service.

Hence, I pass the following order.

ORDER

It is hereby held that the action of the management of M/s Bardez Bazar Consumers Co-operative Society Limited, Mapusa Goa, in transferring S/Shri Vinod Khalap, Manohar Gadekar, Uday Munj and Sanjay Aradkar is legal and justified. It is hereby further held that the transfers of S/Shri Vinod Khalap, Manohar Gadekar, Uday Munj and Sanjay Aradkar with changed designation respectively to the present place of posting does not amount to demotion in service. It is hereby held that the said workmen are not entitled to any reliefs.

No order as to cost.

Inform the Government accordingly.

Sd/-

(AJIT J. AGNI)
Presiding Officer
Industrial Tribunal

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